

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>88-11590</u>
DR. ALAN DALE CLARK)	
)	
Debtor)	Filed at
_____)	at 5 O'clock & 42 min. PM	
)	Date 1-24-92
DR. ALAN DALE CLARK)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>89-1002</u>
MARY CAROLE BRAY CLARK)	
)	
Defendant)	

ORDER AND RECOMMENDATION TO THE DISTRICT COURT

Defendant, Mary Carole Bray Clark t"Ms. Clark"), moves the court to alter or amend the order dated December 19, 1991, or alternatively for a new trial, contending her brief should have been considered in resolving the issue on remand in this adversary proceeding. Plaintiff, Dr. Alan Dale Clark ("Dr. Clark"), the Chapter 7 debtor, opposes defendant's motion.

This adversary proceeding was remanded to this court by the district court for a more in depth inquiry into the nature of Dr. Clark's obligation under a decree of total divorce entered by the Superior Court of Fulton County, Georgia to indemnify and hold Ms. Clark harmless from any loss incurred as a result of the claim of Liberty [Fidelity] National Bank. On December 19, 1991, having

conducted a more in depth inquiry into the nature of the obligation in question based on the record on appeal and the evidence presented at trial, I signed an order determining that the obligation is not in the nature of a support obligation, and is therefore dischargeable, without consideration of the brief filed by Ms. Clark

because it was filed after the bar date set by a prior order dated May 31, 1991.

In her motion to alter or amend, Ms. Clark contends I erred in counting the number of days prescribed by the May 31 order for requesting a hearing on remand and submitting briefs. The order of May 31 provided in pertinent part as follows:

In the event that either party desires to introduce new evidence in this adversary proceeding [on remand], the party must request a hearing within ten (10) days of the date of this order. . . . Barring a request for hearing, either party may submit additional memorandum in support of their position within twenty (20) days of the expiration of the initial ten-day period.

Ms. Clark submitted her brief on July 5, 1991, which she contends was within the time allowed by the May 31 order. Ms. Clark argues that the weekend days during the ten-day period prescribed by the May 31 order for requesting a hearing should not have been counted and that therefore, the parties had twenty days from June 14 to submit briefs. Because the 20th day from June 14 was July 4, a legal holiday, Ms. Clark contends she had until July 5 to submit a brief.

Under the version of Bankruptcy Rule 9006(a) in effect on

May 31, 1991 the intermediate weekend days were included in calculating the time allowed by the May 31 order to request a hearing because the prescribed time was ten days, not less than eight (8) days. See, Bankruptcy Rule 9006(a) (1989).¹

¹Bankruptcy Rule 9006(a) (1989), in effect on May 31, 1991, provided in pertinent part:

In computing any period of time prescribed or allowed by these [bankruptcy] rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. . . . When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Formerly, Bankruptcy Rule 9006(a) provided that weekend days were not counted if the time prescribed or allowed was less than 11 days. See Bankruptcy Rule 9006(a) (1987).² The rule was amended in 1989 because "[a]n undesirable result of [the rule] was that 10-day time

periods prescribed in the interest of prompt administration of bankruptcy cases were extended to at least 14 calendar days."³ Advisory Committee Note to Bankruptcy Rule 9006(a) (1989). "As a result of the present amendment [1989], 10-day time periods prescribed or allowed will no longer be extended to at least 14 calendar days because of intermediate weekends and legal holidays." Id.; see generally 9 Collier on Bankruptcy, ¶9006.03, 9006-11 9006-12 (L. King 15th ed. 1991). Under Bankruptcy Rule 9006(a), the parties had until June 10, 1991 to request a hearing pursuant to the order of May 31, 1991. The parties had 20 days, beginning June 11, to brief the court. Because June 30, 1991 fell on a Sunday, the parties had until July 1 to submit briefs. Ms. Clark submitted her brief on July 5.

Dr. Clark's response in opposition to Ms. Clark's motion to alter or amend

²Bankruptcy Rule 9006(a) (1987), in effect from August 1, 1987 to July 31, 1989, provided in pertinent part:

In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

³The effective date of the amendment was August 1, 1989. Amendments to the Federal Rules of Bankruptcy Procedure, H.R. Doc. No. 54, 101st Cong., 1st Sess. 1 (April 25, 1989); 57 U.S.L.W. 4463, 4467 (May 2, 1989).

raises a jurisdictional issue that must be addressed. Dr. Clark argues as an alternative ground for denying Ms. Clark's motion to alter or amend that Ms. Clark has no standing to prosecute her appeal of this court's original order filed September 22, 1989, which is the order that gave rise to the appeal and subsequent remand of this case. In the order of September 22, 1989 I determined that certain obligations of Dr. Clark under the divorce decree are nondischargeable as being in the nature of

support, but not his obligation to indemnify and hold Ms. Clark harmless for any loss she may incur on the claim of Liberty [Fidelity] National Bank. Clark v. Clark (In re: Clark), 105 B.R. 753 (Bankr. S.D. Ga. 1989), aff'd, 113 B.R. 797 (S.D. Ga. 1990), vacated and remanded, 925 F.2d 1476 (11th Cir. 1991) (table). On October 6, 1989, each party filed a motion for reconsideration⁴ of the September 22 order. On November 20, 1989 I signed an order denying both motions. The order denying the motions for reconsideration was docketed November 29, 1989. Dr. Clark contends that under Bankruptcy Rule 8002(b), the parties had ten (10) days from November 20, 1989, the date the order denying both motions for reconsideration was signed, to file a notice of appeal. Under Bankruptcy Rule 8002(b),⁵ however, the time for filing

⁴Dr. Clark filed a motion designated as "Motion to Alter or Amend the the [sic] Court's Findings or Make Additional Findings and Amend the Judgment Accordingly" pursuant to Bankruptcy Rule 7052, incorporating Federal Rule of Civil Procedure (FRCP) 52. Ms. Clark filed a motion designated as "Defendant's Motion to Alter or Amend Judgment, for Reconsideration, or for New Trial on the Issue of Dischargeability of the Debtor's Obligation to Pay Fidelity National Bank and Hold Defendant Harmless" pursuant to Bankruptcy Rule 9023, incorporating FRCP 59. For the purpose of simplicity, each motion is referred to in this order as a "motion for reconsideration."

⁵Bankruptcy Rule 8002 provides in pertinent part:

(a) **Ten-Day Period.** The notice of appeal shall be filed with the clerk within 10 days from the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any

notice of

appeal runs from the date of entry of an order granting or denying timely motions made pursuant to Bankruptcy Rule 7052(b) or Bankruptcy Rule 9023. The order denying the parties' motions was entered November 29, 1989, the date it was docketed. Bankruptcy Rules 9021 and 5003. Dr. Clark filed notice of appeal December 5, 1989,⁶ within ten (10) days of November 29, 1989 and Ms. Clark filed notice of cross-appeal on December 13, 1991, within ten (10) days of Dr. Clark's notice of appeal.

However, Dr. Clark's argument that his notice of appeal and Ms. Clark's notice of cross-appeal were untimely filed also requires this court to determine whether the initial motions for reconsideration were "timely" filed. Bankruptcy Rule 8002(b). If the motions were not timely filed, the time for appeal ran from the

other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

. . . .

(b) **Effect of Motion on Time for Appeal.** If a timely motion is filed by any party: (1) under Rule 7052(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (2) under Rule 9023 to alter or amend the judgment; or (3) under Rule 9023 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

(c) **Extension of Time for Appeal.**

The bankruptcy judge may extend the time for filing the notice of appeal A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired. .

. .

⁶Dr. Clark's appeal was dismissed by the district court for failure to prosecute.

date of entry of the order for which reconsideration was sought, rather than running from the date of entry of the order denying the motions for reconsideration. Bankruptcy Rule 8002(b). Dr. Clark's motion was made pursuant to FRCP 52 (see footnote 4). Under FRCP 52(b), his motion was timely only if filed "not later than 10 days after entry of judgment. . . ." Ms. Clark's motion was made pursuant to FRCP 59 (see footnote 4). Under FRCP 59(b), her motion was timely only if filed "not later than 10 days after entry of judgment." The order in question was entered, docketed, September 25, 1989. The parties had ten (10) days, beginning September 26, 1989 and including intermediate weekend days, see Bankruptcy Rule 9006(a),⁷ to file a motion pursuant to FRCP 52 or FRCP 59. The tenth day fell on October 5, 1989. Both motions were filed October

6, 1989.⁸ Under the terms of FRCP 52 and FRCP 59 and Bankruptcy Rule 9006(a) (1989),

⁷FRCP 6(a) provides in pertinent part, "In computing any period of time prescribed by these rules . . . [,] [w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Under FRCP 6(a), intermediate weekend days would not be counted in determining whether the two motions for reconsideration were timely filed. The current language in I Bankruptcy Rule 9006(a) (1991) expressly making the provisions of Bankruptcy Rule 9006(a) govern computation of time where a Federal Rule of Civil Procedure is made applicable by a bankruptcy rule was not part of Bankruptcy Rule 9006 in 1989 when the parties' motions were filed (see note 1, supra), but was added by amendment in 1991. Although FRCP 6(a), by its terms, appears applicable in determining the timeliness of the parties' respective motions filed pursuant to Federal Rules of Civil Procedure without the recently added provision in Bankruptcy Rule 9006(a), to the contrary, under FRCP 81(a)(1), FRCP 6(a) did not apply. See Matter of Eichelberger, 943 F.2d 536 (5th Cir. 1991).

⁸Documents are "filed" when received and docketed by the court. Matter of Bad Bubba Racing Products, Inc., 609 F.2d 815

the respective motions were late filed. Because neither motion for reconsideration was timely, the time for filing notice of appeal was not tolled and thus ran from September 25, 1989, not from the date of the entry of the order denying the motions. Bankruptcy Rule 8002(b). Neither party sought an extension of time pursuant to Bankruptcy Rule 8002(c). The parties therefore had until October 5, 1989 to file notice of appeal. Dr. Clark's notice of appeal filed December 5, 1989 was out of time. Because Dr. Clark's notice of appeal was out of time, Ms. Clark's notice of cross-appeal was also late filed. Bankruptcy Rule 8002(a).

"It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982) [quoting Browder v. Director. Illinois Dept. of Corrections, 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978)]. Accord United States v. Robinson, 361 U.S. 220, 224, 80 S.Ct. 282, 285, 4 L.Ed.2d 259 (1960); Torres v. Oakland Scavenger Co., 487 U.S. 312, 315, 108 S.Ct. 2405, 2408, 101 L.Ed.2d 285 (1988); Vaughter v. Eastern Airlines, Inc., 817 F.2d 685, 688-89 (11th Cir. 1987). Thus, "[t]he ten day mandate of [Bankruptcy] Rule 8002(a) has been strictly construed, requiring strict compliance

with its terms." In re: Universal Minerals, Inc., 755 F.2d 309, 311 (3rd Cir. 1985). Accord Matter of Ramsey, 612 F.2d 1220 (9th Cir. 1980); In re: LBL Sports Center Inc., 684 F.2d 410 (6th Cir. 1982); Matter of Robinson, 640 F.2d 737 (5th Cir. 1981). Absent a timely filed notice of appeal, the district court lacks jurisdiction to review an order and judgment of the bankruptcy court. Matter of Ramsey, *supra*, at 1222; In re: Abdallah, 778 F.2d 75, 77 (1st Cir. 1985), cert. denied, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 657 (1986); Matter of Estate of Butler's Tire & Battery Co, Inc., 592 F.2d 1028, 1034 (9th Cir.

(5th Cir. 1980).

1979). See also 28 U.S.C. 158(c). The circuit court lacks appellate jurisdiction without proper jurisdiction in the district court. Matter of Ramsey, supra, at 1222; In re: Abdallah, supra, at 77; In re: Caribbean Tubular Corp., 813 F.2d 533, 535 (1st Cir. 1987). See also 28 U.S.C. §158(d). Therefore, an order of the bankruptcy court becomes final and nonappealable if a timely notice of appeal is not filed. In re: LBL Sports Center Inc., supra, at 412. As a timely appeal of the order docketed September 25, 1989 was not taken, the order entered by this court on September 25, 1989 appears final and nonappealable. Id. Neither party raised the issue of the untimeliness of the other party's motion for reconsideration and neither this court, the district court, nor the circuit court addressed the issue. Newly

retained counsel for Dr. Clark, now presents a novel procedural problem questioning the appellate jurisdiction of the district court and circuit court in the bankruptcy court on remand after both

appellate courts reviewed the order appealed from

Compare Torres, supra. Even though Dr. Clark failed to raise this issue in the district court or circuit court, jurisdiction cannot be waived. Torres, supra, 108 S.Ct. at 2409 n. 3; Browder, supra, 98 S.Ct. at 561. "[A]lthough a court may construe the rules [requiring timely notice of appeal] liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of [the rules] . . . if it finds that they have not been met." Torres, supra, 108 S.Ct. at 2409.

Moreover, this case does not come within the "unique circumstances" doctrine, which in appropriate cases saves an untimely appeal. Under the "unique circumstances" doctrine,

"[c]ourts will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred prior to

the expiration of the official time Period such that the appellant could have given timely notice had he not been lulled into inactivity.

Willis v. Newsome, 747 F.2d 605, 606 (11th Cir. 1984) (emphasis added). See, e.g., Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962); Wolfsohn v. Hankin, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964); Thompson v. INS, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964); Pinion v. Dow Chemical. U.S.A., 928 F.2d 1522 (11th Cir. 1991); Inglese v. Warden, U.S. Penitentiary, 687 F.2d 362 (11th Cir. 1982).

In this case the ten day time period for filing notice of appeal expired on October 5, 1989. As of that date, no notice of appeal, motion for extension of time, nor motion pursuant to either Bankruptcy Rule 7052(b) (FRCP 52) or Bankruptcy Rule 9023 (FRCP 59) had been filed. The time for filing notice of appeal ran without any action by either party to perfect an appeal. There was no reliance on this court's consideration of the untimely motions for reconsideration that deterred either party from filing a timely notice of appeal. The issue of whether the district and circuit courts had jurisdiction to review the order of this court entered September 25, 1989 must be decided by the reviewing courts.

CONCLUSION

It is therefore the recommendation of this court that the district court withdraw the reference of this adversary proceeding pursuant to 28 U.S.C. §157(d) to determine whether there was jurisdiction in the district court to review this court's order entered September 25, 1989. The order of this court dated December 19, 1991 is ORDERED vacated.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 24th day of January, 1992.